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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1929

G. E. HERRON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

No. [redacted]

BRIEF FOR APPELLANT

P. H. HAYES,
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IN THE

Supreme Court of the United States

October Term 1929

G. E. HERRON,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

No. 914

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Appellant, as plaintiff, filed his suit in the Superior Court of the State of Arizona in and for the County of Maricopa, on the 20th day of September, 1928, against the appellee, as defendant, alleging in his complaint in said action that he sustained personal injuries resulting in damages, and damages to his automobile, by reason of the negligence of the appellee, its servants and employees, in operating its cars and train, and in backing its freight cars without signal, lights or warning upon and over its track in an easterly direction over and across Seventh Avenue, an extensively traveled street in the city of Phoenix, Arizona, along which appellant was driving his automobile on the night of the occurence of

the accident and injury upon which appellant predicated his action.

The appellee duly filed a petition for the removal of the cause from the state court to the United States District Court in and for the District of Arizona and, pursuant to said petition, the cause was, by order of the Superior Court of Maricopa County, Arizona, made and entered on the 16th day of October, 1928, removed to the United States District Court for the District of Arizona.

A general demurrer interposed by the appellee to the complaint of appellant was overruled by the District Court after the removal of the cause thereto and, thereafter, the appellee filed its answer denying generally and specifically every allegation of appellant's complaint and alleging that the injury of appellant, if any, was caused or directly and proximately contributed to by the negligence of the appellant.

The case came on for trial on the 7th day of May, 1929, before the Honorable F. C. Jacobs, United States District Judge in and for the District of Arizona, and a jury, at Phoenix, Arizona. The appellant, in support of the allegations of his complaint, called and introduced eleven witnesses, including himself, all of whom testified in his behalf. No evidence was introduced by the appellee and, at the close of appellant's case, the appellee moved the court to instruct the jury to return a verdict in favor of the appellee upon the ground and for the reason, among others, that the evidence of appellant showed contributory

negligence on the part of appellant which precluded his recovery in said action.

Following the argument upon said motion the court granted the same upon the ground stated, and counsel for the appellant duly excepted to this ruling by the court for the reason that Section 5 of Article 18 of the Constitution of the State of Arizona required the court to submit to the jury the question of contributory negligence in the case. Section 5 of Article 18, of the Constitution of the State of Arizona, provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

Thereafter, appellant's motion for a new trial having been overruled by the district court, an appeal was perfected by appellant to the United States Circuit Court of Appeals for the Ninth Circuit, which said court, on the 3rd day of March, 1930, certified to this Court the following question:

First. Is the above provision of the constitution of the state of Arizona binding and controlling upon a federal court sitting in that state? Or, putting the question in another form:

Second. May a federal court sitting in the state of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the

state constitutional provision to the contrary? (Certificate, page 2).

ARGUMENT

(Since there is but one question or proposition of law involved here, the appellant believes a summary of the argument would serve no purpose and the same is accordingly omitted.)

The effect of the Arizona constitutional provision here involved, as construed and announced by the Supreme Court of the State of Arizona, has been to take from the court, in all personal injury cases, the power or duty to determine the question of contributory negligence or assumption of risk and to vest that power or duty solely in the jury. The decisions of the Supreme Court of the state involving the provision establish beyond any question that, in any action for personal injury arising and tried within the State of Arizona, the jury, and the jury alone, has the right to determine whether or not the plaintiff was guilty of contributory negligence or had assumed the risk of the injury of which he complains.

In Inspiration Consolidated Copper Co. v. Conwell, 21 Ariz., 480, 486, 190 Pac. 88, the Court said:

> "Were it not for Article 18, Section 5 of the State Constitution * * * it would have been the duty of the trial court to have granted the defendants a new trial on the ground that the verdict was contrary to the evidence on the question of assumption of risk * * * The language of

> the provision is plain and unambiguous, and to our minds clearly indicates that the power or duty to finally and conclusively settle the question of contributory negligence or assumption of risk is, by the terms, transferred from the Court to the jury * * * We think that the evident purpose and intent of the provision is to make the jury the sole arbiter of the existence or non-existence of contributory negligence or assumption of risk in all actions for personal injuries."

This construction of the provision was reiterated and approved in the later case of Davis vs. Boggs, 22 Ariz. 497, 505; 199 Pac., 116, wherein it was also decided by the Court that, though the provision is found in the Article of the Constitution entitled "Labor," it applies to all personal injury actions; and the interpretation placed upon the provision in the Conwell case and the Davis case, supra, has been approved and followed by the Court in the following Arizona cases:

Varela vs. Reid, 23 Ariz., 414, 419; 204 Pac. 1017.

Wiser vs. Copeland, 23 Ariz. 325, 328; 203 Pac. 565.

Morenci Southern Ry. Co. vs. Monsour, 24 Ariz. 49, 51; 206 Pac. 489.

The question of the effect of the constitutional provision here under consideration in personal injury actions tried in the United States Courts was before

the Circuit Court below in the case of Southern Pacific Company vs. Martinz, (9th Cir.) 270 Fed. 770. In that case the plaintiff's intestate was killed while attempting to cross the railroad track at a crossing in an automobile in full view of an approaching train. In passing upon the contention made by the appellant in that case, that the trial judge should have instructed the jury to return a verdict for the defendant by reason of the negligence of plaintiff's intestate, the Court said:

> "The negligence of the driver and of the plaintiff's intestate in so attempting to cross the track might have been sufficient to justify the court below in directing a verdict for the defendant, but for the fact that the Constitution of Arizona provides: 'The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.'
>
> "A similar provision in the Constitution of Oklahoma was under consideration in Chicago, R. I. & Pac. Ry. Co. v. Cole, 251 U. S. 54, 64 L. Ed. 133, 40 Sup. Ct. Rep. 68, in which the constitutional provision was held to require the submission of the defense of contributory negligence to the jury in a case where the plaintiff's intestate stepped upon the railroad track when a train was approaching in full view and was killed."

The decision of the court in the Martinez case, supra, having been rendered as it was in a case which,

insofar as the application of the principle therein announced is concerned, is identical with the case at bar, would seem to finally and conclusively settle the question here involved and leave no room for the contention that Section 5, Article 18, Constitution of the State of Arizona, has no application to personal injury actions arising in Arizona and tried in the United States Courts in that state. Since, however, at the trial of this case, it was argued by the appellee that the holding of the Court in the Martinez case had been modified, if not overruled, by the later case of Atchison, T. and S. F. Ry. Co. vs. Spencer, (1927, 9th Circuit), 20 Fed. (2nd) 714, it is but proper that we should advert to the Spencer case, supra, and point out to the Court some of the facts and circumstances surrounding the decision rendered therein which, in our opinion, render the case valueless as an authority upon the proposition with which the Court is here concerned.

The decision in the Spencer case, supra, was clearly and expressly based by the court upon the ground that since the injury complained of by the plaintiff in that case was sustained by him while he was within the State of New Mexico, though the action was tried in Arizona, the law of New Mexico controlled the question as to whether or not the trial court could direct a verdict for the defendant upon the ground of the plaintiff's contributory negligence. The court there was in no manner concerned with deciding the effect of the constitutional provision here involved upon a personal injury action arising and tried within the State of Arizona; and while it is true that the court did discuss the question in its

opinion in the case, it expressly refused to render any final and authoritative decision thereon and any statements made by the court in its opinion with respect to the question are, therefore, but mere dicta and of no weight whatever in view of the previous holding of the court in the Martinez case. Further than this, while the authority upon which the dicta in the Spencer case is based is Barrett vs. Virginian Ry Co., 250 U. S. 473; 63 L. Ed. 1092, a case which announced no new principle of law but merely reiterated principles long established by previous decisions of this Court, it should be noticed that the Barrett case had been decided at the time the Martinez case arose and the decision in that case must be presumed to have been weighed and considered by the circuit court in reaching its decision in the Martinez case.

Another argument advanced by the appellee in the trial of this case was to the effect that the Martinez case did not decide that Section 5, Article 18, Constitution of the State of Arizona, was applicable to personal injury actions arising within the State of Arizona and tried in the United States Court of that District, but that the decision in that case was based upon the fact that the evidence in the case upon the question of the contributory negligence of the plaintiff's intestate was not clearly sufficient to have compelled a decision by the trial court that, if a verdict were rendered in favor of the plaintiff, the defendant would be entitled to a new trial. The mere statement of this argumnt, however, is sufficient to disclose its fallacy. If the evidence of contributory negligence in the Martinez case was in the condition

contended for by the appellee, that fact, and that fact alone, would have been sufficient to justify the trial court in refusing to direct a verdict for the defendant and no consideration whatever need have been given by the circuit court to Section 5, Article 18, Constitution of the State of Arizona.

Baltimore & Ohio Railroad Co. vs. Griffith, 159 U. S. 603, 611; 40 U. S. Law Ed., 274, 278.

Delk vs. St. Louis & San Francisco Railroad Co., 220 U. S.., 580, 587; 55 U. S. Law Ed., 590, 595.

Phoenix Mutual Life Ins. Co. vs. Doster, 106 U. S., 31, 32; 27 U. S. Law Ed., 65, 66.

Keyes vs. Grant, 118 U. S., 25, 37; 30 U. S. Law Ed., 54, 58.

The sum and substance of the appellee's contention is that though the defendant in the Martinez case was clearly and entirely precluded from obtaining a directed verdict in its favor on the ground of contributory negligence of the plaintiff's intestate, by reason of the state of the evidence upon that point, yet the court vainly and unnecessarily considered the effect upon such a case of the constitutional provision here involved. The sophistry of such an argument is self-evident, and we submit that the effect of Section 5, Article 18, Constitution of the State of Arizona, was considered by the circuit court in the Martinez case because such consideration was essential to a decision of the case; and we further submit that as a result of its consideration the court clearly and un-

equivocally held that the constitutional provision must be applied and given effect to by the United States Courts in all personal injury actions arising and tried within the State of Arizona.

An examination of those portions of the opinions in the Spencer case, supra, and in the Barrett case, supra, which touch upon the efficacy, in the Federal Courts, of a constitutional or statutory provision of a state which takes away or modifies the right of the court to direct a verdict for a party in cases which, but for the existence of such a constitutional provision, it would be the right and duty of the court to direct a verdict, discloses that the reason given by the Courts for holding such provisions inapplicable to cases tried in the federal courts lies in the fact that, in the opinion of the courts, the Act of June 1, 1872—the Conformity Act.—(U. S. C. Compact Ed., Title 28, Chapter 18, Sec. 724) does not require that the federal courts apply and give effect to such provisions. Such a view does not, however, in our opinion, dispose of the whole question.

Section 725, Chapter 18, Title 28, United States Code, provides as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In the view which we take of this provision, and we sincerely believe it to be sound, if Section 5, Ar-

ticle 18, Constitution of the State of Arizona, be held and construed to be a rule of substantive law rather than of procedure, if it vested in the defendant *a right* to have the question of his contributory negligence determined by a jury rather than by the Court, then the Arizona Constitutional provision is applicable to and must be given effect in trials in the United States Courts of personal injury actions arising and tried within the State of Arizona; for, as the principle has been well stated by this court in Re McNiel, 13 Wall., 236, 243; 30 L. Ed. 624, 626:

> "A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity or admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. *A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality.*" (Italics ours.)

With respect to the question of whether or not the Arizona Constitutional provision is substantive or merely procedural, the circuit court below said in the Spencer case, supra:

"It is our opinion that the constitutional provision in Arizona lays down a rule of substantive law rather than one pertaining to remedy or procedure * * * It cuts deep into the right, observed at common law, by which the defendant can obtain a decision by the court upon a proven state of facts * * * It seems clear that such a provision is essentially substantive and that the federal conformity statutes do not require its application."

Certainly, if the right of the defendant, at common law, to obtain a decision by the Court upon a given state of facts be considered a matter of substantive law, rather than of procedure, then the right of the plaintiff given by statute, to have the question of his contributory negligence, in all cases, decided by the jury is equally a matter of substantive law.

In Chicago, R. I. and P. Ry. Co. vs. Cole, 251 U. S. 54, 55; 64. L. Ed., 133. 134; 40 Sup. Ct. Rep., 68, this Court, in considering Article 23, Section 6, Constitution of the State of Oklahoma,—which is identical with Section 5, Article 18, Constitution of the State of Arizona,—undoubtedly viewed the constitutional provision as having the effect of diminishing the right of the defendant to the defense of contributory negligence in certain cases and as being, therefore, a mattr of substantive law rather than of procedure. The Court, speaking through Justice Holmes, there said:

"The state constitution was in force when the death occurred, and therefore the defendant had only such right to the defense of contributory

negligence as the Constitution allowed. The argument that the railroad company had a vested right to that defense is disposed of by the decisions that it may be taken away altogether * * * In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished, when the ground might have been altogether removed."

In Byrne vs. Kansas City, F. S. and M. R. Co., 61 Fed. 605; 9 C. C. A., 666; 22 U. S. App., 220; 24 L. R. A., 693, the facts of the case, briefly stated, were these: Plaintiff filed an action for damages against the defendant railroad company in the Circuit Court of the United States for the Western District of Tennessee, alleging that his intestate had been negligently run over and killed by a train of the defendant company at a crossing within the city of Memphis. At the time of the accident the following statutory provisions were in force in the State of Tennessee, (Milliken and Vertrees Code Secs. 1298 et seq.):

"Section 1298: 3rd. On approaching a city or town, the bell or whistle shall be sounded when the train is at a distance of one mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts and at intervals till it has left the corporate limits."

"Section 1299: Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall

be responsible for all damages to persons or property, occasioned by or resulting from any accidents or collision that may occur."

Upon the trial of the case there was some evidence introduced by the plaintiff to the effect that the bell of the train was not rung as the crossing at which the accident occurred was approached, in violation of Section 1298, Paragraph 3, quoted above; but the trial court nevertheless instructed the jury to return a verdict in favor of the defendant by reason of the contributory negligence of the plaintiff's intestate. After reviewing the decisions of the Supreme Court of Tennessee which involved the construction of Section 1299, quoted above, and determining that the effect of that section, as construed and applied by the courts of Tennessee, was to render the proof of contributory negligence not a complete bar to an action for damages but only a circumstance to be considered by the jury in mitigation of damages, the Circuit Court of Appeals took up the question of whether or not the United States courts were bound to apply and give effect to Section 1299, and the construction placed upon that section by the state courts, in actions arising in Tennessee and tried in the United States Courts sitting in that state. The court, speaking through Justice Taft, said in its opinion in the case:

"If the decisions of the supreme court of Tennessee are controlling in this forum upon this point, then there can be no doubt that contributory negligence is not a bar to the action under section 1299 for failure to comply with any of

the subsections of section 1298, and that the court below erred in taking the case from the jury * * * "

"The question whether we are bound by the decision of the supreme court of Tennessee as to the effect of contributory negligence in statutory actions depends on the basis given by that court for its conclusion. If the statute is held to be merely declaratory of the common law both in its requirements and in the liability imposed for failure to observe it, and the plea of contributory negligence is allowed only in mitigation of damages, because, in the view of the supreme court of Tennessee, that is the only effect it could have in an action for common law negligence, we conceive that the effect of contributory negligence in such a case would be a question of general common law, with respect to which we might exercise an independent judgment. But if the rule of the state supreme court grows out of the peculiar liability imposed by the statute as distinguished from that imposed for negligence at common law, then it is the legitimate effect of a construction of a state statute by the highest tribunal of the state, and we are, of course, bound by it * * * We are thus brought back to the proposition that the rule of law in Tennessee which prevents the defense of contributory negligence from being a complete bar to the action under the statute grows out of the language of the statute itself and the construction of that language by the supreme court of Tennessee. Therefore it follows that the duty of the trial

judge in the court below was to follow the decisions of the state court with reference to the defenses under this statute, and that the gross negligence of Mason was not a complete bar to the action, but should have been considered by the jury in mitigation of damages."

There is this analogy between the Byrne case, supra, and the case at bar: the statutory provision of Tennessee involved in the Byrne case and the constitutional provision of Arizona here involved both have the same effect, namely, to diminish the efficacy of the plaintiff's contributory negligence as a defense which would bar the plaintiff's right to a recovery. Both provisions are matters of substantive law rather than procedure. And we earnestly submit that if, as it was decided by the court in the Byrne case, the Federal Courts are bound to apply and give effect to the statutory provision of Tennessee in cases arising within that state, then, for the same reasons, the trial court below was bound to apply and give effect to the constitutional provision of Arizona in the case now before the Court, and its failure to do so constituted manifest and reversible error.

CONCLUSION

We submit, in conclusion, that the question with which the Court is here concerned has been heretofore fully considered by the circuit court below and that, upon such consideration, the court decided that the Arizona constitutional provision was binding and controlling upon a federal court sitting in that state.

We submit further that, for all of the reasons stated herein, the decision of the circuit court is correct and the questions certified to this Court should be answered accordingly.

Respectfully submitted,

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M. J. DOUGHERTY,

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